STATE OF MICHIGAN

COURT OF APPEALS

JANET POLK,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
August 21, 2001

No. 219956
Oakland Circuit Court
LC No. 98-010083-CK

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this breach of contract and misrepresentation action, plaintiff appeals by right from the trial court's opinion and order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Proceedings

Defendant was plaintiff's insurance carrier for her home and personal property. On August 1, 1987, plaintiff, who was moving to Michigan, rented a storage unit in Nevada in order to store certain personal property. Around Christmas of 1989, plaintiff returned to Nevada to check on the property stored in the unit. It is undisputed that plaintiff did not return again until May 13, 1997. At that time, plaintiff discovered that most of her personal property was missing from the storage unit and promptly reported the loss to the police. Plaintiff was not able to provide the police with an exact date that the loss occurred, because she had not checked on the property for seven and one half years.

On January 21, 1998,[1] plaintiff, filed a property loss claim with defendant seeking $57,000. Plaintiff contends that her homeowners policy provided full insurance coverage for personal property owned or used by an insured person anywhere in the world and fully covered losses of personal property due to theft or attempted theft, including the disappearance of

[1] This date appears on the Sworn Statement in Proof of Loss, plaintiff filed with defendant. However, at oral argument before this Court, plaintiff contended that she had previously reported the loss to defendant by way of a telephone call. Nonetheless, the lower court record does not contain any evidence establishing that plaintiff did indeed contact defendant by telephone; therefore, we will not consider it part of the record before us.

property from a known place, likely as a result of a theft. On June 24, 1998, defendant denied plaintiff's claim, stating that plaintiff's property was not covered by the policy at the time of the loss and that plaintiff had failed to provide reasonable proof of the amount of the loss as required by the terms and conditions of the policy. Defendant's denial letter also stated that it reserved all rights and defenses available under the insurance policy and the laws of the State of Michigan.

As a result of defendant's denial, plaintiff filed suit against defendant. In her complaint, plaintiff alleged breach of contract based on defendant's denial of coverage and also alleged misrepresentation under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* In response to plaintiff's complaint, defendant moved for summary disposition on multiple grounds, including those listed in its denial letter of June 24, 1998.[2] The trial court granted summary disposition, finding that while plaintiff's property was covered by defendant's policy, plaintiff had failed to specify the time and date of the loss when filing her claim and that as a result defendant suffered actual prejudice in investigating the claim.

II. Standard of Review

This Court's review of a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10) is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establishes a genuine issue of material fact to warrant a trial. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Spiek*, *supra* at 337. Further, in reviewing whether summary disposition was appropriate, we are to give the nonmoving party the benefit of all reasonable inferences. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995).

III. Analysis

Plaintiff contends that the proof of loss provided to defendant was adequate because even though she did not specify a time or date on which her loss occurred, other relevant information such as the location from which the items were stolen, a list of stolen items, and the approximate value of those items was provided. Plaintiff also contends, that, assuming the trial court correctly found that she did not comply with the policy requirements, the trial court erred in finding as a matter of law that defendant suffered actual prejudice as a result of plaintiff's failure to comply with all contractual conditions. We agree that the trial court erred in finding as a matter of law that defendant suffered actual prejudice, and reverse the trial court's grant of summary disposition.

In *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), our Supreme Court stated:

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[2] Defendant actually moved for summary disposition pursuant to MCR 2.116(C)(8). However, because both parties relied on evidence outside the pleadings, the trial court correctly treated the motion as being made under MCR 2.116(C)(10).

> Ordinarily, one who sues for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied. However, it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position.

The record in this case does not support the trial court's finding that actual prejudice was established as a matter of law. First, the trial court opined that the theft may have occurred around the time when plaintiff's property was first placed in storage. This conclusion is no more supported by the available evidence than the conclusion that the theft occurred just before it was discovered by plaintiff. In either case, defendant failed to provide any evidence establishing that it was actually prejudiced as a result of plaintiff's failure to provide the date of loss with specificity. Such evidence was required before defendant would be entitled to judgment as a matter of law. *Koski*, *supra*; see also *Helder v Sruba*, 462 Mich 92, 98 n 13; 611 NW2d 309 (2000). Thus, drawing all reasonable inferences in favor of the nonmoving party, *Bertrand*, *supra*; *De Sanchez v Dep't of Mental Health*, 455 Mich 83, 89; 565 NW2d 358 (1997), the trial court erred in granting summary disposition in favor of defendant. The question of whether defendant suffered actual prejudice as a result of plaintiff's failure to provide the date of loss with specificity must be resolved by the trier of fact.

Plaintiff also argues that the trial court erred by granting defendant's summary disposition motion on her MCPA claim. We disagree. In *Smith v Globe Life Ins Co*, 460 Mich 446, 466-467; 597 NW2d 28 (1999), our Supreme Court held that actions against insurers may be brought under § 11 of the MCPA, MCL 445.911, so long as the claims allege "misconduct made unlawful by chapter 20 of the Insurance Code[,]" MCL 500.2001 *et seq*. There, the Court found allegations that the defendant insurance company misrepresented the advantages, benefits, terms and conditions of the insurance policy in violation of §903(1) of the MCPA, MCL 445.903(1)(g),(n),(s),(bb) and (cc) – to the extent that they involved allegations of misconduct made unlawful under chapter 20 of the Insurance Code – actionable under the MCPA. *Smith*, *supra* at 467; see also *Nesbit v American Community Mutual Ins Co*, 236 Mich App 204, 227; 600 NW2d 427 (1999). Here, plaintiff did not allege or introduce evidence that defendant violated chapter 20 of the Insurance Code. Thus, she failed to establish a genuine issue of material fact regarding this issue and failed to state a claim on which relief can be granted. Accordingly, we affirm the trial court's grant of summary disposition on this issue pursuant to both MCR 2.116(C)(8) and (10). Cf *Wickings v Arctic Enterprises*, 244 Mich App 125, 147; 624 NW2d 197 (2000).[3]

Plaintiff also asserts that defendant waived certain defenses by failing to include them in its denial of claim letter. *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999). However, because defendant's asserted defenses were

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[3] Because discovery had not been concluded at the time of the trial court's grant of summary disposition, we express no opinion whether additional evidence can be developed that would support amendment of plaintiff's complaint to assert a MCPA claim.

specifically contained in the policy as exclusions to coverage, we conclude that defendant's express reservation of rights and defenses included in the denial letter served to preserve defendant's defenses for trial. See *Lee v Evergreen Regency Co-op*, 151 Mich App 281, 286; 390 NW2d 183 (1986) and *Havens v Roberts*, 139 Mich App 64, 67; 360 NW2d 183 (1984). To conclude otherwise would, in effect, serve to broaden the coverage the policy provided beyond its terms. *Kirschner v Process Design Associates, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999); *Lee, supra* at 285. Consequently, because defendant expressly reserved its rights under the policy in its denial letter, defendant did not waive its rights and defenses under the policy when it failed to assert specific defenses in its denial letter.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra